Supreme Court, U.S.
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No. 99-1124

IN THE

Supreme Court of the United States

C. VOLANTE CORP.,

Petitioner,

v.

JOHNNIE BROWN, THEODORE KING, ALDO COLUSSI, GEORGE FINCH, CHESTER BROMAN, JOSEPH FERRARA, FRANK FINKEL, and ANIELLO MADONNA, as Trustees and Fiduciaries of the Local 282 Welfare, Pension, Annuity and Job Training Trust Funds,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

Table of Cited Authorities ii

Summary of Argument 1

I. There Is No Conflict Among The Circuits With Respect To The Jurisdiction Of Federal Courts To Address Claims For Delinquent Contributions Pursuant To An Adopted Contract 4

A. The District Courts Have Jurisdiction To Decide Claims Pursuant To An Adopted Contract 4

B. The Doctrine of Adoption Of Contract Is Well-Established In The Federal Courts 9

C. There Is No Conflict Among Courts Of Appeals With Respect To The Section 302 Requirement 14

II. There Is No Split Among Circuit Courts With Respect To The Indicia Of Adoption 21

Conclusion 25

TABLE OF CITED AUTHORITIES

Page

Cases:

Associated Wrecking, Inc. v. Local 95 Pension Fund, No. 92 Civ. 1841, 1994 U.S. Dist. LEXIS 3952 (S.D.N.Y. March 31, 1994) 12

Atlanta Iron Workers v. Southern Stress Wire Corp., 724 F.2d 1458 (11th Cir. 1983) 10, 15, 22, 23

Audit Servs., Inc. v. Rolfson, 641 F.2d 757 (9th Cir. 1981) 10, 15, 22

Baskin v. Hawley, 807 F.2d 1120 (2d Cir. 1986) 10, 18, 19, 22, 23

Benson v. Brower's Moving & Storage, Inc., 907 F.2d 310 (2d Cir. 1990), *cert. denied*, 498 U.S. 982 (1990) 7, 8, 19

Braxton v. United States, 500 U.S. 344 (1991) 4

Bricklayers Local 15 v. Stuart Plastering Co., 512 F.2d 1017 (5th Cir. 1975) 20

Brown v. Dominic Prisco Transport, Inc., No. 95 Civ. 1121 (ADS) (E.D.N.Y. Aug. 16, 1997) ...8, 11, 24

Brown v. J.F.H. Mak Trucking, No. 95 Civ. 2118, 1999 U.S. Dist. LEXIS 17831 (E.D.N.Y. October 6, 1999) 12

Cited Authorities

Page

Chicago District Council of Carpenters v. Ward, No. 93 Civ. 980, 1993 U.S. Dist. LEXIS 17897 (N.D. Ill. Dec. 15, 1993) 22, 23

Collins v. Pension and Ins. Comm., 144 F.3d 1279 (9th Cir. 1998) 13

Denver Metro. Ass'n v. Journeymen Plumbers & Gas Fitters Local No. 3, 586 F.2d 1367 (10th Cir. 1978) 14

Derrico v. Sheehan Emergency Hosp., 844 F.2d 22 (2d Cir. 1988) 7, 8, 11, 23, 24

Empire Excavating Co. v. American Arbitration Ass'n, 693 F. Supp. 1557 (M.D. Pa. 1988), *aff'd without opinion*, 866 F.2d 1409 (3d Cir. 1988) 12, 24

Firesheets v. A.G. Building Specialists, Inc., 134 F.3d 729 (5th Cir. 1998) 9, 12, 16, 19, 20, 21, 24

Gariup v. Birchler Ceiling & Interior Co., 777 F.2d 370 (7th Cir. 1985) 10, 15, 18, 22, 23

Hanley v. Herrill Bowling Corp., No. 94 Civ. 4611, 1995 U.S. Dist. LEXIS 10109 (S.D.N.Y. July 20, 1995) 8, 11

Hanley v. Orient Beach Club, Inc., No. 96 Civ. 4478, 1998 U.S. Dist. LEXIS 1700 (S.D.N.Y. Feb. 18, 1998) 11

Cited Authorities

Page

International Association of Bridge, Structural and Ornamental Iron Workers v. SR Industries Corporation, No. 90 Civ. 1071, 1991 U.S. App. LEXIS 18819 (7th Cir. August 9, 1991) 13

Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Co., 484 U.S. 539 (1988) 2, 3, 4, 5, 7, 8, 11, 12, 13, 24

Lattin v. Kurdziel Iron of Rothbury, Inc., No. 96 Civ. 2558, 1998 U.S. App. LEXIS 10205 (6th Cir. May 15, 1998) 13

LoPresti v. HLH SEPS, Inc., No. 96 Civ. 1834, 1996 U.S. Dist. LEXIS 14184 (S.D.N.Y. Sept. 27, 1996) 22

Moglia v. Geoghegan, 403 F.2d 110 (2d Cir. 1968), *cert. denied*, 394 U.S. 919 (1969) 7, 8, 11, 16, 17, 18, 19, 20, 21, 24

Moriarty v. Larry G. Lewis Funeral Dirs. Ltd., 150 F.3d 773 (7th Cir. 1998) 10, 15

NLRB v. Haberman, 641 F.2d 351 (5th Cir. 1981) 9, 10, 12, 22, 23

Painters Trust v. Sandvig-Ostergard, 737 F. Supp. 1131 (W.D. Wash. 1990) 23

Rabouin v. NLRB, 195 F.2d 906 (2d Cir. 1952) ... 23

Cited Authorities

Page

Robbins v. Lynch, 836 F.2d 330 (7th Cir. 1988) 10, 15, 22

Salisbury v. Kroyer Heating and Air Conditioning, 683 F. Supp. 177 (N.D. Ohio 1986) 23

San Francisco Culinary v. Lucin, No. 92-15086, No. 92-15099, 1993 U.S. App. LEXIS 33554 (9th Cir. Dec. 7, 1993) 23

Smith v. Candler Coffee Corp., No. 95 Civ. 10956, 1996 U.S. Dist. LEXIS 10935 (S.D.N.Y. Aug. 2, 1996) 11

Sullivan v. Brinsky, No. 93 C 5940, 1995 U.S. Dist. LEXIS 2163 (N.D. Ill. Feb. 23, 1995), *aff'd*, No. 95-2164, 1996 U.S. App. LEXIS 9719 (7th Cir. April 12, 1996) 22

Textile Mills Securities Corp. v. Commission of Internal Revenue, 314 U.S. 326 (1941) 4, 19

UA Local 343 of the United Association of Journeymen & Apprentices of the Plumbing and Pipefitting Industries v. Nor-Cal Plumbing, Inc., 48 F.3d 1465 (9th Cir. 1994) 13

UAW, Local 33 v. R.E. Dietz Co., 996 F.2d 592 (2d Cir. 1993) 7, 8, 11, 24

United States v. Stephenson, 895 F.2d 867 (2d Cir. 1990) 16

Cited Authorities

	Page
United States v. Turkette, 452 U.S. 576 (1981) ...	16
U.S. Can Co. v. NLRB, 984 F.2d 864 (7th Cir. 1993)	10
Wenzel v. Edison Parking Corp., No. 94 Civ. 1971, 1995 U.S. Dist. LEXIS 3857 (S.D.N.Y. March 29, 1995)	12
Wenzel v. Jeff Parking Corp., No. 93 Civ. 5071, 1995 U.S. Dist. LEXIS 5815 (S.D.N.Y. May 3, 1995)	11
Wisniewski v. United States, 353 U.S. 901 (1957) .	19
Statutes:	
29 U.S.C. § 158(a)(5)	3, 7, 8, 11, 24
29 U.S.C. § 185	2
29 U.S.C. § 185(c)	14
29 U.S.C. § 186(c)(5)	2, 3, 8, 9, 14, 16, 18
29 U.S.C. § 1132	2
29 U.S.C. § 1132(g)(2)	1
29 U.S.C. § 1145	2
Rule:	
U.S. Sup. Ct. R. 10	4

SUMMARY OF ARGUMENT

Johnnie Brown, Theodore King, Aldo Colussi, George Finch, Chester Broman, Joseph Ferrara, Frank Finkel and Aniello Madonna, as Trustees and Fiduciaries (the "Trustees" or "Respondents") of the Local 282 Welfare, Pension, Annuity and Job Training Trust Funds (the "Funds"), submit this brief in opposition to the Petition for a Writ of Certiorari, docketed on January 5, 2000 (the "Petition"), by C. Volante Corp. ("Petitioner").

On October 8, 1999, the United States Court of Appeals for the Second Circuit decided the case at issue — *Brown v. C. Volante Corp.*, No. 99-7109, 194 F.3d 351 (2d Cir. 1999) (hereinafter the "Volante Decision"). (Annexed to the Petition as Appendix A is the Volante Decision.) In the Volante Decision, the Second Circuit affirmed the decision of the United States District Court for the Eastern District of New York. The District Court held, *inter alia*, that it had jurisdiction to decide this matter, that Petitioner adopted by its conduct two collective bargaining agreements with Local 282, I.B.T. ("Local 282"), and that Petitioner therefore owes the Trustees benefit fund contributions, interest, additional interest and attorneys' fees pursuant to Section 502(g)(2) of the Employee Retirement Income Security Act of 1974, *as amended* ("ERISA"), 29 U.S.C. § 1132(g)(2). (Annexed as Appendix B to the Petition is the Amended Final Judgment of the District Court; annexed as Appendix C to the Petition is the Opinion and Order of the District Court.)

The United States Supreme Court should deny the Petition because there is no conflict between the Second Circuit and any other circuit over the issues raised in the Volante Decision. Specifically, the Volante Decision does

not create a division between the Second Circuit and the Fifth Circuit as to whether a District Court can exercise jurisdiction, pursuant to Section 301 of the Labor-Management Relations Act (the "LMRA"), 29 U.S.C. § 185, and Sections 502 and 515 of ERISA, 29 U.S.C. §§ 1132, 1145, over an action to collect benefit fund contributions and other damages premised upon an adopted contract. In addition, the Volante Decision does not create a split between the Second Circuit and the Fifth Circuit as to whether a signed, written agreement is required under Section 302(c)(5)(B) of the LMRA, 29 U.S.C. § 186(c)(5)(B).

Further, the Volante Decision does not create a conflict between the Second Circuit and the Third, Fifth, Sixth, Seventh and Ninth Circuits as to whether a federal cause of action can be premised upon an adopted contract. Finally, assuming the viability of the theory of adoption of contract, the Second Circuit did not act in conflict with the Third and Fifth Circuits in finding that Petitioner adopted the subject collective bargaining agreements based upon the instant record.

As discussed below, adoption of contract is a well-established doctrine, and one that the federal courts apply routinely within the labor relations setting. Strikingly, Petitioner cites *no* cases in its Petition that reject adoption *per se*. Rather, it invokes two sets of circumstances in which courts have found that trustees of benefit funds cannot prevail in federal court with respect to the collection of contributions. First, Petitioner cites *Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539 (1988), and its progeny. Yet, *Advanced Lightweight* is irrelevant to the case at bar, as it stands only for the narrow rule that federal courts do not have jurisdiction over claims

for contributions based on adherence by an employer to an expired contract pursuant to the employer's obligation under Section 8(a)(5) of the LMRA, 29 U.S.C. § 158(a)(5). In the instant case, the Second Circuit found that Petitioner adopted *current* contracts and not expired contracts. Thus, Section 8(a)(5) was not at issue.

Second, Petitioner cites cases in which courts have denied claims for contributions based on the failure by parties to satisfy the requirement under LMRA Section 302(c)(5)(B) ("Section 302") that contributions be paid pursuant to a "written agreement with the employer." However, such cases do not run counter to the Volante Decision, in which the Second Circuit correctly held that the adopted contracts at issue were detailed written agreements that satisfied the Section 302 requirement.

In short, the Volante Decision did not create any conflict between the Second Circuit and any other circuit court (or within the Second Circuit) with respect to the jurisdiction of federal courts to hear claims stemming from an adopted contract, given that *Advanced Lightweight* is irrelevant in these circumstances and that Section 302 was fully satisfied.

As a fallback position, Petitioner contends in the Petition that even if adoption of contract is an established doctrine, the Second Circuit examined improper indicia in finding adoption. Petitioner is mistaken. The Second Circuit employed precisely the criteria that courts always use. Therefore, no conflict between circuits (or within the Second Circuit)[1] exists with respect to this issue either.

1. To the extent Petitioner contends that a split *within* the Second Circuit is cause for the Supreme Court to grant certiorari, (Cont'd)

I. THERE IS NO CONFLICT AMONG THE CIRCUITS WITH RESPECT TO THE JURISDICTION OF FEDERAL COURTS TO ADDRESS CLAIMS FOR DELINQUENT CONTRIBUTIONS PURSUANT TO AN ADOPTED CONTRACT

A. The District Courts Have Jurisdiction To Decide Claims Pursuant To An Adopted Contract

Pursuant to its grants of jurisdiction under ERISA and the LMRA, and as held by the Second Circuit, the District Court properly asserted jurisdiction over the instant claim for benefit fund contributions pursuant to an adopted contract. (Appendix A at 6a.) In opposition, Petitioners claim that once a contract expires, the District Court does not have jurisdiction to decide a claim stemming from a subsequent contract unless it has been executed. (Petition at 6-7.) In making this claim, Petitioners ignore the well-established body of law recognizing adoption of contract under federal common law (discussed *infra* in Section I(B)), and engage in a protracted and misdirected discussion of *Advanced Lightweight*, *supra*, and its progeny.

(Cont'd)

Petitioner is incorrect, and the Petition should be denied. *See* U.S. Sup. Ct. R. 10 (indicating that conflict between courts of appeals is specific consideration in deciding whether to grant petition for writ of certiorari; conflict within a court of appeals is not named as a consideration); *Textile Mills Securities Corp. v. Commission of Internal Revenue*, 314 U.S. 326, 335 (1941) (commenting that conflicts within a circuit are properly addressed by a court of appeals sitting *en banc*); *see also Braxton v. United States*, 500 U.S. 344, 347 (1991) ("[a] principal purpose for which . . . [the U.S. Supreme Court] use[s] . . . [its] certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals").

Contrary to Petitioner's contention, the decision in *Advanced Lightweight* is simply not germane to the case at bar. The instant case has nothing to do with the general rule of NLRB jurisdiction over unfair labor practice claims, or with "that narrow category of suits seeking recovery of unpaid contributions accrued during the period between contract expiration and impasse." *Advanced Lightweight*, 484 U.S. at 545. The issue in these proceedings was never whether Petitioner had adopted by its conduct the *expired* 1987-1990 contract; rather, the Trustees established that Petitioner adopted by its conduct the 1990-1993 and 1993-1996 contracts, which corresponded to the period for which the Trustees sought to recover delinquent contributions. (Appendix C at 24a; Appendix A at 7a-11a.)

In the Volante Decision, the Second Circuit described the irrelevance of *Advanced Lightweight* to the instant case:

> The Trustees brought the instant claims pursuant to Sections 502(g)(2) and 515 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1132(g)(2), 1145, and Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185. In *Advanced Lightweight*, the Supreme Court held that ERISA Sections 502(g)(2) and 515 do not confer subject matter jurisdiction over claims "to determine whether an employer's unilateral decision to refuse to make post-contract contributions constitutes a violation of the [National Labor Relations Act]." 484 U.S. at 549. According to the Court, Sections 502(g)(2) and 515 confer jurisdiction only over claims for "promised contributions," not over unfair labor practice

claims that an employer has refused to bargain in good faith by failing to make post-contract benefit plan contributions before negotiations for a new contract reached an impasse. See *Advanced Lightweight*, 484 U.S. at 548-49. The decision, therefore, stands only for the unremarkable proposition that the National Labor Relations Board generally has exclusive jurisdiction over unfair labor practice claims. See *NLRB v. Katz*, 369 U.S. 736, 743 (1962) (holding that employer's failure to honor terms of expired CBA during negotiations on new CBA constitutes unfair labor practice); *Advanced Lightweight*, 484 U.S. at 543 n.4 ("As a general rule, federal courts do not have jurisdiction over" unfair labor practice claims.) (internal quotation marks omitted); *but see id.* (noting that federal courts have jurisdiction over unfair labor practice claims that are "collateral" to claims over which there is an independent basis for jurisdiction).

Although it is true that the Trustees' claims arise from appellant's alleged failure to contribute to the Fund after the signed CBA expired, this does not render them *per se* unfair labor practice claims over which the district court lacks jurisdiction under *Advanced Lightweight*. The Trustees are not arguing that appellant has unlawfully refused to bargain by making unilateral changes in working conditions before reaching an impasse over a new CBA. Rather, the Trustees claim that appellant promised to contribute to the Fund by adopting the two CBAs that it never signed. Appellees' claims are thus clearly for "contributions [owing]

> in accordance with the terms and conditions of . . . [a collective bargaining] agreement," 29 U.S.C. §1145, and "violation[s] of contracts between an employer and a labor organization," 29 U.S.C. § 185(a), over which the district court has jurisdiction. See *Advanced Lightweight*, 484 U.S. at 547 ("The liability created by §515 may be enforced by the trustees of a plan by bringing an action in federal district court . . ."); 29 U.S.C. § 185(a).

(Appendix A at 5a-6a.) In short, the holding in *Advanced Lightweight* is inapposite to this case. Here, the Petitioner did not act under the compulsion of LMRA Section 8(a)(5) in abiding by the terms of the expired 1987-1990 agreement. Rather, Petitioner affirmatively complied with the terms of the 1990-1993 and 1993-1996 contracts and, therefore, demonstrated its intent to be bound by these collective bargaining agreements. (Appendix A at 7a.)

Petitioner's misunderstanding of the holding of *Advanced Lightweight* accounts for much of its error in claiming that there is a split between Courts of Appeals (or within the Second Circuit). For example, in Section I of Petitioner's Petition, it points to the Second Circuit's decisions in *Derrico v. Sheehan Emergency Hosp.*, 844 F.2d 22, 29 (2d Cir. 1988), *UAW, Local 33 v. R.E. Dietz Co.*, 996 F.2d 592, 597 (2d Cir. 1993), and *Benson v. Brower's Moving & Storage, Inc.*, 907 F.2d 310, 312-313 (2d Cir. 1990), *cert. denied*, 498 U.S. 982 (1990), as support for its claim that the Second Circuit in the Volante Decision decided the jurisdiction issue incorrectly.[2] (Petition

2. Petitioner also invokes *Moglia v. Geoghegan*, 403 F.2d 110 (2d Cir. 1968), *cert. denied*, 394 U.S. 919 (1969), as support for its (Cont'd)

at 6-10.) Yet, the Second Circuit did not reject the doctrine that a District Court holds jurisdiction over a claim for benefit fund contributions pursuant to an adopted contract in these cases. Rather, in both *Derrico* and *Dietz*,[3] the Second Circuit applied the narrow rule set forth in *Advanced Lightweight* to circumstances in which adoption of a current contract was not alleged, and in which the obligation to abide by the expired contract stemmed only from a duty to maintain the status quo pursuant to LMRA Section 8(a)(5).[4] *Dietz*, 996 F.2d at 597; *Derrico*, 844 F.2d at 26.

(Cont'd)
contention in Section I of the Petition that the District Court lacked jurisdiction to decide the instant case. However, the holding in *Moglia* did not implicate the issue of whether a District Court has jurisdiction to resolve a claim after expiration of a collective bargaining agreement. *Id.* at 114-115. The holding in *Moglia* is applicable primarily to the question of whether an unsigned written agreement can be in compliance with LMRA Section 302(c)(5). The Trustees discuss this issue, *infra*, in Section I(C) of this brief.

3. In *Brower's*, the court did not address adoption, and referred to *Advanced Lightweight* merely for the general proposition that an employer's liability under ERISA is limited to those periods in which collective bargaining agreements are "effective." *Brower's*, 907 F.2d at 316.

4. Petitioner also cites *Brown v. Dominic Prisco Transport, Inc.*, No. 95 Civ. 1121 (ADS) (E.D.N.Y. Aug. 16, 1997), and *Hanley v. Herrill Bowling Corp.*, No. 94 Civ. 4611, 1995 U.S. Dist. LEXIS 10109 (S.D.N.Y. July 20, 1995), in Section I of the Petition. Of course, the Volante Decision would prevail over such cases to the extent that they were in conflict. However, no such conflict exists. Both cases acknowledge the narrow rule of *Advanced Lightweight*, but neither can be read as denying the jurisdiction of federal courts to decide a cause of action based upon an adopted contract. *Dominic Prisco Transport*, No. 95 Civ. 1121, at 24; *Hanley v. Herrill*, 1995 U.S. Dist. LEXIS 10109, at *6-*7.

Moreover, there is no division between the Second Circuit's finding of jurisdiction in the Volante Decision and the Fifth Circuit's decision in *Firesheets v. A.G. Building Specialists, Inc.*, 134 F.3d 729 (5th Cir. 1998). In short, the *Firesheets* court did not discuss the issue of the jurisdiction of the district court to resolve the claims of the trust fund for contributions. *Id.* The Fifth Circuit discussed the factual determination of the district court that the original agreement had terminated, and that the parties had not intended to keep it in place. *Id.* at 731. Such determination is of no relevance to the jurisdiction issue here.

Further, the *Firesheets* court found that the employer had not evidenced intent to adopt the contracts at issue. *Id.* at 731-32. Although the Fifth Circuit did not discuss jurisdiction in its analysis of the adoption argument, its reference to *NLRB v. Haberman*, 641 F.2d 351, 355-56 (5th Cir. 1981), is an implicit endorsement of the Second Circuit's finding of jurisdiction to adjudicate a claim pursuant to an adopted contract. As to the Fifth Circuit's discussion of the requirements of LMRA 302(c)(5), this discussion does not bear upon the jurisdiction issue, and Respondents address this issue, below, in Section I(C).

B. The Doctrine of Adoption Of Contract Is Well-Established In The Federal Courts

Contrary to Volante's contention, there is no conflict among the Courts of Appeals with respect to the existence of a federal common law cause of action for breach of an adopted contract. None of the decisions cited by Petitioner in the Petition rejects the doctrine of adoption of contract. In fact, federal courts routinely hold that employers can adopt collective bargaining agreements by their conduct.

See, e.g., Gariup v. Birchler Ceiling & Interior Co., 777 F.2d 370, 376 (7th Cir. 1985) (finding that employer became "a party to these agreements through its course of conduct," including payment of wages and contributions at contract rates).[5]

In the face of the overwhelming body of case law endorsing the doctrine of adoption of contract, Petitioner attempts to cast doubt upon the doctrine by citing several cases in which courts declined to hold that employers adopted contracts. Petitioner cites two categories of cases to support its Petition: (1) cases where the plaintiff attempted to rely upon an expired contract as a basis for its claim under

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5. *See also Moriarty v. Larry G. Lewis Funeral Dirs. Ltd.*, 150 F.3d 773, 777 (7th Cir. 1998) ("general principles of contract law permit an employer to adopt a collective bargaining agreement by a course of conduct plus a writing such as the certification line on the contribution report"); *U.S. Can Co. v. NLRB*, 984 F.2d 864, 868-870 (7th Cir. 1993) (finding adoption of contract based not on fact that employer is successor, but rather on conduct in conformity with contract); *Robbins v. Lynch*, 836 F.2d 330, 332 (7th Cir. 1988) ("[e]mployer may adopt a collective bargaining agreement by a course of conduct"); *Baskin v. Hawley*, 807 F.2d 1120, 1129 (2d Cir. 1986) (confirming jury's finding of adoption, based on employer's submission of benefit fund contributions and use of union employees); *Atlanta Iron Workers v. Southern Stress Wire Corp.*, 724 F.2d 1458, 1459-1460 (11th Cir. 1983) (finding that employer adopted pre-hire agreement, with court holding that such a "contract is not dependent on its reduction to writing . . . [i]nstead, conduct manifesting an intention to abide by the terms of an agreement is required"); *Audit Servs., Inc. v. Rolfson*, 641 F.2d 757, 763-764 (9th Cir. 1981) (finding adoption of contract based not on fact that employer is successor, but rather on conduct reflecting adherence to contract); *NLRB v. Haberman Constr. Co.*, 641 F.2d 351, 355-356 (5th Cir. 1981) (finding adoption of prehire agreement based on conformity to agreement).

circumstances governed by the holding in *Advanced Lightweight*, *supra*; and (2) cases where courts recognized the theory of adoption, but found that the plaintiff had failed to establish sufficient adoption indicia. Yet, such cases do not conflict with the Volante Decision.

In fact, none of the cases cited by Petitioner in Section II of the Petition supports its contention that there is a conflict with respect to the doctrine of adoption of contract either within the Second Circuit[6] or between the Second Circuit

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6. *See Dietz*, 996 F.2d at 597 (following *Advanced Lightweight* where adoption of current contract not alleged); *Derrico*, 844 F.2d at 26 (same); *Moglia*, 403 F.2d 118 ("on the record as made, we hold that there was no ratification of, or any adoption of, the collective bargaining agreement by [the employer]"); *Hanley v. Orient Beach Club, Inc.*, No. 96 Civ. 4478, 1998 U.S. Dist. LEXIS 1700, at *20-*21 (S.D.N.Y. Feb. 18, 1998) (following *Advanced Lightweight* where employer had claim for offset as to benefit fund contributions paid after contract expired and before parties bargained to impasse); *Brown v. Dominic Prisco Transport., Inc.*, No. 95 Civ. 1121, at 24 ("under the facts of the present case, the Court concludes that the conduct alleged by the Trustees is insufficient to demonstrate that HLC adopted the previous collective bargaining agreement"); *Smith v. Candler Coffee Corp.*, No. 95 Civ. 10956, 1996 U.S. Dist. LEXIS 10935, at *4-*11 (S.D.N.Y. Aug. 2, 1996) (after reviewing whether an "implied-in-fact-contract" existed, court followed *Advanced Lightweight* where plaintiff invoked Section 8(a)(5) with respect to payment of benefit fund contributions); *Hanley v. Herrill*, 1995 U.S. Dist. LEXIS 10109, at *6-*7 (following *Advanced Lightweight* where employer "may have felt obligated to continue its contributions to the Funds in order to maintain the 'status quo' after the expiration of the 1990 CBA under NLRA § 8(a)(5)"); *Wenzel v. Jeff Parking Corp.*, No. 93 Civ. 5071, 1995 U.S. Dist. LEXIS 5815, at *5, *14-*15 (S.D.N.Y. May 3, 1995) (finding submission of eight benefit fund contribution payments and one

(Cont'd)

and the Third, Fifth, Sixth, Seventh or Ninth Circuit Courts of Appeals. To begin with, in *Empire Excavating Co. v. American Arbitration Ass'n*, 693 F. Supp. 1557 (M.D. Pa. 1988), *aff'd without opinion*, 866 F.2d 1409 (3d Cir. 1988), the Third Circuit endorsed adoption, finding that in order "for a collective bargaining agreement to be found, all that is required is conduct manifesting an intention to be bound by the terms of an agreement." *Empire Excavating*, 693 F. Supp. at 1562. However, the court found that the employer had refused to comply with the terms of the current contract and had, therefore, not adopted the contract by its conduct. *Id.* at 1563. Instead, the employer had adhered only to the terms of the expired contract, thus bringing the case within the purview of the *Advanced Lightweight* rule. *Id.* at 1561.

Further, in *Firesheets*, *supra*, the Fifth Circuit cited approvingly to its own recognition of the adoption doctrine in *Haberman*, 641 F.2d at 355-56, but then found that the employer's "actions, by and large, are inconsistent with the creation of a new agreement." *Firesheets*, 134 F.3d at 731-732.

(Cont'd)

remittance report to be insufficient to evidence adoption); *Wenzel v. Edison Parking Corp.*, No. 94 Civ. 1971, 1995 U.S. Dist. LEXIS 3857, at *5-*6, *9-*10 (S.D.N.Y. March 29, 1995) (following *Advanced Lightweight* where employer stated that it paid benefit fund contributions in accord with expired agreement in order to comply with Section 8(a)(5)); *Associated Wrecking, Inc. v. Local 95 Pension Fund*, No. 92 Civ. 1841, 1994 U.S. Dist. LEXIS 3952, at *4-*5 (S.D.N.Y. March 31, 1994) (following *Advanced Lightweight* where plaintiff claimed employer had duty to pay contributions in accord with expired contract). *See also Johnnie Brown v. J.F.H. Mak Trucking*, No. 95 Civ. 2118, 1999 U.S. Dist. LEXIS 17831 (E.D.N.Y. October 6, 1999) (court not faced with adoption issue or *Advanced Lightweight* rule, but rather simply found that contractual obligation to maintain surety bond expired with expiration of contract).

In *Lattin v. Kurdziel Iron of Rothbury, Inc.*, No. 96-2558, 1998 U.S. App. LEXIS 10205 (6th Cir. May 15, 1998), the Sixth Circuit followed the *Advanced Lightweight* rule where the issue was enforcement of an expired contract, and the question of adoption of a current contract never arose. *Lattin*, 1998 U.S. App. LEXIS 10205, at *2-*4. Likewise, in *International Association of Bridge, Structural and Ornamental Iron Workers v. SR Industries Corporation*, No. 90 Civ. 1071, 1991 U.S. App. LEXIS 18819 (7th Cir. August 9, 1991), the Seventh Circuit found that, pursuant to *Advanced Lightweight*, the district court lacked jurisdiction over a claim for benefit fund contributions allegedly owed after the expiration of a contract, where adoption was never raised. *SR Industries*, 1991 U.S. App. LEXIS 18819, at *11-*12.

Finally, in *Collins v. Pension and Ins. Comm.*, 144 F.3d 1279 (9th Cir. 1998), and *UA Local 343 v. Nor-Cal Plumbing, Inc.*, 48 F.3d 1465 (9th Cir. 1994), the Ninth Circuit also acknowledged the rule of *Advanced Lightweight*, but did not reject the doctrine of adoption of contract. In *Collins*, the issue of adoption of contract did not even arise. *Collins*, 144 F.3d at 1283-1284. In *Nor-Cal*, the court rejected the application of *Advanced Lightweight* to circumstances in which the employer was not a contract signatory, but formed a single employer with a company that had signed a contract.[7] *Nor-Cal*, 48 F.3d at 1470-1471.

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7. It is odd that Petitioner cites *Nor-Cal*, given the court's holding in that case that federal courts have jurisdiction over claims for delinquent contributions where an employer has *not* signed a contract (but is a single employer with an employer that has). *Nor-Cal*, 48 F.3d at 1470-1471.

Accordingly, because there is no conflict among the Courts of Appeals, the Court should deny the Petition.

C. There Is No Conflict Among Courts Of Appeals With Respect To The Section 302 Requirement

Petitioner argues in Section I of the Petition that Section 302 precludes adoption of contract in the ERISA setting. (Petition at 9a-11a.) This is false. No circuit court — including the Second, Fifth and Seventh Circuits — has ever found that Section 302 is not satisfied by an adopted contract.

According to Petitioner, the Section 302 requirement that payments to a trust fund be made pursuant to a "written agreement" would be violated if Petitioner were ordered to pay benefit fund contributions to the Trustees in this case.[8]

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8. Petitioner seems to argue in the Petition that Section 302 must be satisfied in order to give federal courts jurisdiction over claims based on adopted contracts. However, Section 302 is not a jurisdictional provision. *See* LMRA Section 301(c), 29 U.S.C. § 185(c) (the provision of the LMRA that provides jurisdiction to the federal courts over the instant claim). Rather, Section 302 provides certain conditions that must be satisfied for the payment of benefit fund contributions by an employer to a trust fund to be legal. *See* Appendix A at 8a (Section 302(c)(5)(B) requires that an agreement be " 'written' and [that it] set forth 'a detailed basis on which . . . payments are to be made' to a trust fund"); *Denver Metro. Ass'n v. Journeymen Plumbers & Gas Fitters Local No. 3*, 586 F.2d 1367, 1372 (10th Cir. 1978) (as evidenced by the pertinent legislative history, "the purpose of the provision is that the welfare fund shall be a perfectly definite fund, that its purposes shall be stated so that each employee can know what he is entitled to, can go to court and enforce his rights in the fund, and that it shall not be, therefore, in the sole discretion of the union or the union leaders and usable for any purpose which they may think is to the advantage of the union or the employee").

In short, Petitioner contends that adopted contracts — because they are unsigned — do not satisfy the "written agreement" requirement.[9] (Petition at 9-11.)

In the Volante Decision, the Second Circuit expressly disposed of Petitioner's contention, as follows:

> Appellant's argument, however, overlooks the statutory language. Section 302(c)(5)(B) does not require that an agreement be signed, only that it be "written" and set forth "a detailed basis on which . . . payments are to be made" to a trust fund. Id. Accordingly, an unsigned, written agreement satisfies Section 302(c)(5)(B)'s "written agreement" requirement. *See Gariup v. Birchler Ceiling & Interior Co.*, 777 F.2d 370, 375 (7th Cir. 1985) (concluding that a "signed, unexpired collective bargaining agreement between the parties is not required to satisfy section 302(c)(5)(B); rather section 302(c)(5)(B) requires only a 'written agreement'").

(Appendix A at 8a.)[10]

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9. Contrary to Volante's assertions of a signature requirement under Section 302, in every decision where a court has endorsed the doctrine of adoption of contract in the ERISA setting, it has found either explicitly or implicitly that the Section 302 requirement does not require a *signed* contract, but rather requires only a *written* contract. *See, e.g., Gariup*, 777 F.2d at 376; *Moriarty*, 150 F.3d at 777; *Lynch*, 836 F.2d at 332; *Southern Stress*, 724 F.2d at 1459-1460; *Audit Servs.*, 641 F.2d at 763-764.

10. As a matter of well-settled statutory construction, where language is clear and unambiguous, courts reject attempts to engraft

(Cont'd)

In opposing the Second Circuit's holding, Petitioner argues that the Volante Decision, as well as Seventh Circuit holdings in accord, conflict with other cases in the Second Circuit, as well as with the Fifth Circuit's decision in *Firesheets*. (Petition at 14-15.) Petitioner's argument is without merit.

To begin with, Petitioner misconstrues the Second Circuit's decision in *Moglia*. In *Moglia*, the issue revolved around the denial of benefits to a plaintiff by a pension fund, such denial being based on "the fact that there never ha[d] been a written collective bargaining agreement or any other written agreement between [the employer] and [the union] detailing the basis upon which payments were to be made by [the employer], on behalf of its employees, into the Trust Fund." *Moglia*, 403 F.2d at 115. In the instant case, it is undisputed that Petitioner was a party to at least one signed, written contract prior to the period at issue.

Petitioner claims, nonetheless, that the court in *Moglia* found that no written agreement under Section 302 can exist without a signature. (Petition at 9-11.) In the Volante Decision, the Second Circuit squarely rejected this misinterpretation of its decision in *Moglia*:

(Cont'd)
additional requirements or limitations upon the statute. *See United States v. Turkette*, 452 U.S. 576, 580-81 (1981) ("[i]f the statutory language is unambiguous, in the absence of a 'clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive'"); *United States v. Stephenson*, 895 F.2d 867, 871 (2d Cir. 1990) ("we decline to fashion a restrictive view of a statute that is plain on its face"). Thus, if Congress had intended that Section 302(c)(5) only apply to *signed* written agreements, it could have quite easily inserted the word "signed" into the statute.

> Our decision in *Moglia v. Geoghegan*, 403 F.2d 110 (2d Cir. 1968), is not to the contrary. There, we held that an unsigned, written agreement between a union and a trust fund did not comply with Section 302(c)(5)(B) when the union and the trust fund "never" had a signed CBA detailing the basis upon which payments were to be made. 403 F.2d at 114, 115. We rejected a putative beneficiary's argument that its employer adopted the unsigned agreement because, on the facts of that case, the employer "did not appear to be willing to accept [the] terms [of the unsigned CBA] at any time." *Id.* at 118.

(Appendix A at 8a, n.1.) As further held in the Volante Decision, the Second Circuit in *Moglia* did not

> graft a signature requirement onto Section 302(c)(5)(B). Unlike the employer in *Moglia*, appellant's conduct manifested an intent to adopt the terms of the unsigned CBAs.

(Appendix A at 8a, n.1.)

An examination of *Moglia* supports the Second Circuit's holding in the Volante Decision. To begin with, the *Moglia* court — in invoking the "specific dictates" of Section 302 — focused on the requirement of "a written agreement," and not a *signed* written agreement. *Moglia*, 403 F.2d at 115-116. The court then highlighted the plaintiff's admission that "at no time relevant to the cause of action asserted in her complaint [was there] a collective bargaining agreement or any other written agreement, as such" between the employer and the union. *Id.* at 117.

Further, in concluding that there had never been a "written agreement," the court in *Moglia* pointed out not only that the employer had made pension contributions pursuant to an unsigned contract, but also that the unsigned contract *had never been adopted*. In fact, the Second Circuit in *Moglia* unequivocally endorsed the doctrine of adoption of contract, but concluded that "*on the record as made*, we hold that there was no ratification of, or any adoption of, the collective bargaining agreement by [the employer]" (emphasis added). *Id.* at 118.

Hence, the decision in *Moglia* stands for a straightforward proposition, namely, that in the absence of adoption, an unsigned contract does not fulfill the Section 302 requirement.[11] Of course, in contrast to the circumstances in *Moglia*, Petitioner *did* adopt contracts with the Union during the relevant period. Accordingly, the Second Circuit correctly rejected Petitioner's assertion of Section 302 as a defense.

In any event, regardless of Petitioner's view of *Moglia*,[12]

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11. *See Gariup*, 777 F.2d at 376 (holding that *Moglia* does not hold that a signed, unexpired collective bargaining agreement must exist to satisfy section 302; rather it was the absence of any 'written agreement' that led the court in *Moglia* to determine that section 302(c)(5)(B) had not been satisfied").

12. It should be noted that the Second Circuit has previously interpreted *Moglia* in the same fashion. In *Baskin*, the Second Circuit stated that *Moglia*

> suggests that an employer may be bound to [a collective bargaining] agreement either by signing it or by adopting and ratifying it.

(Cont'd)

the Second Circuit's interpretation of that case in the Volante Decision is binding.[13]

Similarly, there is no conflict between the Volante Decision and the Fifth Circuit's holding in *Firesheets*, *supra*. In *Firesheets*, benefit fund trustees argued that an employer underpaid contributions for a period subsequent to the expiration of a collective bargaining agreement. In ruling against the plaintiffs, the court found first that the original contract had expired and that the parties had not intended it to continue. *Firesheets*, 134 F.3d at 731. The court then held that the employer had not adopted a contract subsequent to the expired one. Finally, having found that the original

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(Cont'd)
Baskin, 807 F.2d at 1128-1129. Petitioner also contends that another Second Circuit decision, *Brower's*, *supra*, requires the existence of a signed contract in order for a federal court to exercise jurisdiction over a claim for contributions. (Petition at 7.) In fact, the court in *Brower's* held that the employer "must contribute to the Funds without a preliminary determination that there exists a collective bargaining agreement that would be recognized as valid under labor-management relations law." *Brower's*, 907 F.2d at 316. Further, the Second Circuit in that case did not address Section 302 or adoption, but merely referred to the employer as a contract signatory. *Id.* at 314.

13. As noted above, a court of appeals sitting *en banc* is the only entity with the authority to resolve an intra-circuit conflict. *See, e.g.*, *Textile Mills*, 62 S. Ct. at 277-278. This is the case even where contemporaneous panels conflict. *See, e.g.*, *Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (holding that it is "primarily the task of a Court of Appeals to reconcile its internal difficulties"). Of course, in the case at bar — with respect to the *Moglia* decision — there are no conflicting decisions between panels; rather the Second Circuit panel that rendered the Volante Decision has simply elaborated upon the holding issued by a sister panel three decades ago.

agreement had expired and that no subsequent contract had taken its place, the court concluded that no agreement existed during the relevant period to satisfy the Section 302 requirement. *Id.* at 731-32. The *Firesheets* court, like the *Moglia* court, premised its finding that Section 302 was not satisfied on the absence of a signed contract *or* an adopted contract. *Id.*

Without explanation, Petitioner attempts to use *dicta* from *Firesheets* out of context as a holding to the effect "that without signatures on the collective bargaining agreement and the trust agreement attached to it, a written agreement under § 302(c) did not exist." *Firesheets*, 134 F.3d at 732. However, in its discussion of *Firesheets*, Petitioner ignores the court's holding that, as in *Moglia*, a signed contract or an adopted contract satisfies the Section 302 requirement.[14]

A review of the decision in *Firesheets* as a whole demonstrates that the case is fully in accord with the analysis of *Moglia* set forth in the Volante Decision. As in *Moglia*, the court in *Firesheets* endorsed the principle of adoption of contract:

> [T]his circuit has held that "adoption of a labor contract is not dependent on the reduction to writing of [the parties'] intention to be bound. Instead what is required is conduct manifesting an intention to abide by the terms of the agreement" (citation omitted).

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14. The Fifth Circuit's citation to *Bricklayers Local 15 v. Stuart Plastering Co.*, 512 F.2d 1017 (5th Cir. 1975), further supports the *Firesheets* holding that an adopted contract complies with Section 302. In *Bricklayers*, the Fifth Circuit expressly contemplated adoption as an alternative to execution of the written agreement at issue. *Bricklayers*, 512 F.2d at 1029.

Firesheets, 134 F.3d at 731. The Fifth Circuit then reviewed the standard adoption criteria, noting the employer's arguments that its "conduct is not consistent with the formation of an agreement." *Id.* For example, the employer failed to adjust its wage rates and to pay holiday pay according to the contract at issue. *Id.* Finally, the Fifth Circuit concluded that the employer's "actions, by and large, are inconsistent with the creation of a new agreement." *Id.*

It was only after rejecting the plaintiffs' adoption of contract argument that the court in *Firesheets* invoked *Moglia*, pointing to the lack of an executed agreement to satisfy Section 302. Thus, *Firesheets* must be read, like *Moglia* and the Volante Decision, as standing for the principle that *in the absence of adoption*, an unsigned contract does not fulfill the Section 302 requirement.

As discussed next, Petitioner errs in arguing that the indicia of adoption examined by the Second Circuit were improper.

II. THERE IS NO SPLIT AMONG CIRCUIT COURTS WITH RESPECT TO THE INDICIA OF ADOPTION

As a fallback position, Petitioner contends in the Petition that "even if conduct was a basis for finding an adoption of contract, Petitioner's conduct did not indicate an intent to be bound by the unsigned agreements." (Petition at 23.) In short, Petitioner argues that the criteria examined by the Second Circuit in determining that Petitioner adopted contracts with Local 282 were not appropriate. Petitioner is incorrect.

It is simply beyond dispute that the adoption criteria employed by the Second Circuit are the standard indicia courts review in considering adoption. The Second Circuit based its decision that Petitioner adopted the 1990-1993 and 1993-1996 contracts on these findings of fact: Petitioner submitted remittance reports to the Funds for sixty-one consecutive months; Petitioner paid its drivers union-scale wages; Petitioner's drivers all were members, or sought to be members, of the Union; all of the company's work was union work; Petitioner maintained a surety bond as required by the contract in order to guarantee payments of contributions to the Trustees; Petitioner submitted without challenge to an audit by the Trustees for the period covered by the adopted contracts; and, Petitioner acknowledged in writing, after receiving the audit report, that the company had "a responsibility to the funds," and offered to pay part of the liability stemming from the audit. (Appendix A at 7a-10a; Appendix C at 18a-19a, 21a-24a.)

In determining the intent of Petitioner, the Second Circuit (and the lower court) examined precisely the indicia of adoption that courts typically employ. First, a number of courts have considered the payment of contributions at contract rates to be evidence of adoption. *See, e.g., Lynch*, 836 F.2d at 332; *Baskin*, 807 F.2d at 1129; *Gariup*, 777 F.2d at 374; *Southern Stress Wire*, 724 F.2d at 1460; *Haberman*, 641 F.2d at 355; *Audit Services*, 641 F.2d at 763; *LoPresti v. HLH SEPS, Inc.*, No. 96 Civ. 1834, 1996 U.S. Dist. LEXIS 14184, at *6-*7 (S.D.N.Y. Sept. 27, 1996); *Sullivan v. Brinsky*, No. 93 C 5940, 1995 U.S. Dist. LEXIS 2163, at *16-*17 (N.D. Ill. Feb. 23, 1995), *aff'd*, No. 95-2164, 1996 U.S. App. LEXIS 9719 (7th Cir. April 12, 1996); *Chicago District Council of Carpenters v. Ward*, No. 93 C 980, 1993 U.S. Dist. LEXIS 17897, at *11-*12 (N.D. Ill. Dec. 15,

1993); *Painters Trust v. Sandvig-Ostergard*, 737 F. Supp. 1131, 1136 (W.D. Wash. 1990); *Salisbury v. Kroyer Heating and Air Conditioning*, 683 F. Supp. 177, 181 (N.D. Ohio 1986).

Second, courts have often found that the payment of wages at union contract rates is evidence that the corresponding contracts have been adopted. *See, e.g., San Francisco Culinary v. Lucin*, No. 92-15086, No. 92-15099, 1993 U.S. App. LEXIS 33554, at *5 (9th Cir. Dec. 7, 1993); *Lynch*, 836 F.2d at 332; *Gariup*, 777 F.2d at 374; *Southern Stress Wire*, 724 F.2d at 1460; *Haberman*, 641 F.2d at 355; *Rabouin v. NLRB*, 195 F.2d 906, 910 (2d Cir. 1952); *Ward*, 1993 U.S. Dist. LEXIS 17897, at *11-*12.

Third, courts have found that if a company employs only union members, this evidences adoption. *See, e.g., Baskin*, 807 F.2d at 1129; *Southern Stress Wire*, 724 F.2d at 1460; *Salisbury*, 683 F. Supp. at 181.

Fourth, courts have considered an employer's maintenance of a surety bond in order to guarantee the payment of benefit fund contributions as a sign of adoption. *See, e.g., Ward*, 1993 U.S. Dist. LEXIS 17897, at *12.

Fifth, courts have found that if a company submits to an audit by union benefit funds, this is evidence that the company has adopted a union contract. *See, e.g., Southern Stress Wire*, 724 F.2d at 1460; *Ward*, 1993 U.S. Dist. LEXIS 17897, at *12.

Petitioner's claim that there is a conflict among the Courts of Appeals over this issue is groundless. (Petition at 26.) To begin with, Petitioner cites cases like *Derrico*, in

which the court found that the payment of contributions did not evidence adoption only because the circumstances lent themselves to the narrow rule of *Advanced Lightweight. Derrico*, 844 F.2d at 26. *See also Dietz*, 996 F.2d at 597; *Dominic Prisco Transport*, No. 95 Civ. 1121, at 21, 24. That is, regardless of whether criteria that ordinarily reflect adoption are present, the obligation of a party to abide by an *expired* contract, by operation of Section 8(a)(5), is enforceable only before the National Labor Relations Board.

To support its proposition, Petitioner cites several courts that did not reject the criteria employed by the Second Circuit in the Volante Decision, but rather found that the plaintiffs in those cases had not proven all of the indicia of adoption that Respondents proved in the instant case. *See* Petition at 24-26; *compare Firesheets*, 134 F.3d at 731-32 (employer did not follow contract in several respects, including payment of wages and holiday pay); *Moglia*, 403 F.2d at 118 (employer's continuing refusal to agree to contract clearly evidenced intent not to be bound); *Empire Excavating*, 693 F. Supp. at 1561-63 (employer refused to pay benefit fund rate in current contract).

In sum, Petitioner has failed to meet its burden of demonstrating a conflict among the Courts of Appeal as to the indicia employed by the Second Circuit in finding adoption. Accordingly, the Petition should be denied.

CONCLUSION

For the reasons set forth herein, the Trustees respectfully request that the Court deny the Petition.

Respectfully submitted,

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